(3)

Supreme Court, U.S.
FILED
DEC 3 1997
CLERK

No. 97-485

In The
Supreme Court Of The United States
October Term, 1996

STATE OF CONNECTICUT, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF IN SUPPORT OF DEFENDANTS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners:

RICHARD BLUMENTHAL
ATTORNEY GENERAL
OF CONNECTICUT

BERNARD F. McGOVERN, JR.*
ELIOT D. PRESCOTT*
SETH R. KLEIN
Assistant Attorneys General
Office of the Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
(860) 808-5330

*Counsel of Record

488

ARGUMENT

The United States makes three principal arguments as to why the State of Connecticut's Petition for Writ of Certiorari in this case should not be granted. Each of these contentions is without merit and requires little additional discussion.

First, the United States argues that the State's fundamental concern regarding the special master's intrusion on the State's core sovereign functions is not before the Court. This claim is premised on the flawed notion that the State agreed to the appointment of the special master in a July 15, 1997 order of the trial court.

At the time the July 15, 1997 order was entered by the trial court, the period in which to seek rehearing before the court of appeals in this case had not run, nor had the time to seek review from this Court expired. In the case pending before the court of appeals--the State's appeal of the trial court's June 19, 1996 adjudication of contempt and appointment of a special master--the State of Connecticut directly challenged the appointment of the special master. To argue, therefore, that the State somehow waived its right to continue to challenge the appointment by agreeing to the entry of a subsequent order that (1) identified the individual who would actually serve as special master, and (2) more fully described his duties, is completely without merit.

The State of Connecticut merely agreed that, **provided** the issues relating to the adjudication of contempt and appointment of a special master could not be reviewed by a court of appeals until a later time, **as the United States had long asserted**, the case should be permitted to move forward. In the meantime, the State of Connecticut continued to pursue vigorously its objections to the adjudication of contempt and appointment of a special master in

the first instance by filing a Petition for Writ of Certiorari in this court.

For the United States to now argue that the State of Connecticut has consented to the substantial intrusions of the special master requires it to ignore both the context in which the July 15, 1997 ordered was entered and the arguments that the United States has made repeatedly in this case: that the substantial intrusion on state sovereignty that the State of Connecticut seeks to avoid cannot be reviewed until long after the intrusion has occurred and the State is without a remedy.

Second, the United States over and over asserts in its brief that the District Court did not appoint a special master in this case until long after the June, 1996 order from which the State appealed. The United States continues to assert this claim despite the fact that the plain language of the June, 1996 order sets forth the Court's decision to appoint a special master and explicitly details the actions which the special master must take. Nowhere in its Brief in Opposition does the United States do anything but merely restate its bald conclusion that the special master was not appointed until July, 1997. Again, it is clear that the latter order merely identified the individual who would serve as a special master and that the decision to appoint a special master occurred over a year prior to that order.

Finally, the United States also argues that the petition should not be granted because the State of Connecticut could have sought review of the June, 1996 order by way of mandamus. The cases relied upon by the United States in support of this claim are inapposite. None of the cases cited by the United States involved a decision of a trial court, as in this case, that qualified for appellate review either by way of appeal as a final decision or as an appealable interlocutory order under *Cohen v. Beneficial Indus. Loan*

Corp., 337 U.S. 541, 546 (1949). In the present case, because the June, 1996 order is a final decision, or, at the least, is an appealable interlocutory order, resort to the extraordinary remedy of mandamus was not required.

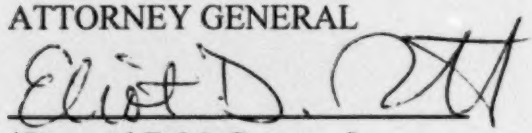
CONCLUSION

For all of the foregoing reasons, the petitioners assert that a writ of certiorari should be granted to review the decision of the Court of Appeals.

Respectfully submitted,

STATE OF CONNECTICUT

RICHARD BLUMENTHAL
ATTORNEY GENERAL



*Bernard F. McGovern, Jr.
*Eliot D. Prescott
Seth R. Klein
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel. No. (860) 808-5330

*Counsel of Record